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No. 85-861

In the Supreme Court of the United States

OCTOBER TERM, 1985

HADDON HOUSE FOOD PRODUCTS, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8(a)(1), (2) and (3) of the National Labor Relations Act by recognizing a union which, due to petitioner's unremedied unfair labor practices, did not represent an uncoerced majority of petitioner's employees.

2. Whether the Board properly found, alternatively, that petitioner violated Section 8(a)(1), (2) and (3) of the Act by according recognition to one union, in an initial organizing campaign, when another union had filed a valid representation petition with the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A15) is reported at 764 F.2d 182. The decision and order of the National Labor Relations Board (Pet. App. A16-A41) are reported at 269 N.L.R.B. 338.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1985. A petition for rehearing was denied on August 22, 1985 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on November 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3.

STATEMENT

1. In November 1975, Teamsters Local Union No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, obtained signed authorization cards from 27 of petitioner's 56 employees.[1] On November 19, 1975, Local 115 filed a petition for a representation election with the Board. This petition was never dismissed or withdrawn, although the Board did hold it in abeyance because of unfair labor practice charges filed by Local 115 against petitioner on November 21, 1975. Pet. App. A6.

A complaint was issued, and a hearing held, on the charges filed by Local 115. The Board found that petitioner had engaged in numerous independent violations of Section 8(a)(1) of the Act and had violated Section 8(a)(1) and (3) by discharging eight employees because of their union activities and refusing to reinstate 14 unfair labor practice strikers. The Board ordered petitioner: (i) to cease and desist from these unfair labor practices and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights; and (ii) to offer reinstatement, with backpay, to the 22 employees unlawfully discharged or denied reinstatement. *Haddon House Food Products, Inc.*, 242 N.L.R.B. 1057, 1057-1059, 1065-1069, 1073 n.5, 1075 (1979).

The Board further concluded, however, that these standard measures were inadequate to remedy petitioner's "extraordinary violations" (242 N.L.R.B. at 1059 n.11), which the Board found "[were] such that they [were] likely to have a continuing coercive effect on the free exercise by employees of their [statutory] rights long after the violations * * * occurred" (*id.* at 1058). For this reason, the

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[1] The two employers in this case, Haddon House Food Products, Inc. and Flavor Delight, Inc., are under common ownership and management, and they accordingly will be referred to herein as "petitioner."

Board also provided certain additional remedies "designed to dissipate as much as possible the lingering atmosphere of fear created by [petitioner's] unlawful conduct and to insure that if the question of union representation [were] placed before employees in the future they [would] be able to voice a free choice" (*ibid.*).[2]

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[2] Specifically, the Board ordered petitioner to take the following steps (242 N.L.R.B. at 1058-1059 (footnotes omitted)):

> (1) in addition to posting copies of the attached notice marked "Appendix" at its Medford, New Jersey, facility, include it in the appropriate company publications and mail it to each individual employee at his or her home address, including but not limited to all employees on the payroll at the time the unfair labor practices were committed; all such notices, both mailed and posted, to be signed personally by [petitioner's] owner and manager, Harold Anderson, who shall also read the notice to current employees assembled for that purpose. [Petitioner] shall afford the Board a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice; (2) publish in local newspapers of general circulation a copy of the above notice two times per week for a period of 4 weeks; (3) upon request, grant [Local 115] and its representatives reasonable access to [its] bulletin boards and all places where notices to employees are customarily posted; (4) upon request, grant [Local 115] reasonable access to [its] plant in nonwork areas during employees' nonwork time; (5) supply [Local 115], upon request made within 1 year of the date of this Decision and Order, the names and addresses of [its] current employees; (6) give notice of, and equal time and facilities for [Local 115] to respond to, any address made by [petitioner] to [its] employees on the question of union representation; and (7) afford [Local 115] the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which [it] is a participant. Provisions (3), (4), (6) and (7), above, shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

On January 26, 1981, the Court of Appeals for the District of Columbia Circuit upheld the Board's unfair labor practice findings and enforced its remedial order with but one modification (*Teamsters Local 115* v. *NLRB*, 640 F.2d 392), observing that petitioner's conduct "constituted 'a well-orchestrated antiunion campaign that featured repeated and egregious violations' " (*id.* at 395, quoting 242 N.L.R.B. at 1061 (Chairman Fanning and Member Jenkins, concurring and dissenting)).[3] The court of appeals sustained the Board's refusal to issue an order requiring petitioner to bargain with Local 115, despite the pervasive nature of petitioner's unfair labor practices. The court so ruled because, although Local 115 had demonstrated that it had the support of 27 of the 54 or 55 employees in the bargining unit, t[illegible]pport fell short of actual majority status. *Id.* at 395-[illegible]th petitioner and Local 115 filed petitions for a writ of certiorari, which this Court denied on October 5, 1981. 454 U.S. 827, 837.[4]

2. On or about June 15, 1981 -- while the petitions for a writ of certiorari were pending in this Court and before petitioner had complied with the Board's remedial order that had been enforced by the court of appeals -- Local 80, Food and Allied Service Workers, chartered by the United Food and Commercial Workers, AFL-CIO, commenced its own organizational campaign among petitioner's employees. On July 8, 1981, the American Arbitration Association, after conducting a check of authorization cards signed by employees, certified that a majority of the

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[3] The District of Columbia Circuit declined to enforce the requirement that petitioner's owner personally read the notice to the assembled employees (see note 2, *supra*), holding instead that any responsible officer of petitioner could read the notice. 640 F.2d at 403-404.

[4] Local 115 sought review of the court of appeals' decision insofar as it sustained the Board's refusal to issue a bargaining order in the absence of evidence that Local 115 had ever achieved majority status. Petitoner sought review of the extraordinary remedial measures which were enforced by the District of Columbia Circuit.

employees desired representation by Local 80. However, Local 115 was not notified of the card check, and the American Arbitration Association was not notified of Local 115's pending election petition or of petitioner's unremedied unfair labor practices (Pet. App. A20 & n.5).

After the card check, petitioner recognized Local 80 as the exclusive bargaining representative of its production and warehouse employees. Thereafter, on or about July 24, 1981, petitioner and Local 80 entered into separate collective bargaining agreements for each of the two groups of employees; each agreement contained a union-security clause. At the time of its recognition of Local 80 and execution of the contracts, petitioner had offered reinstatement to 19 of the 22 employees entitled to reinstatement under the Board's previous order, but had not complied with any of the extraordinary remedial provisions of that order. At all relevant times, Local 115 maintained a continuing interest in representing petitioner's production and warehouse employees—as evidenced by its then-pending petition for a writ of certiorari seeking review of the denial of a bargaining order—and Local 80 assertedly had no knowledge of Local 115's pending representation petition or petitioner's unremedied unfair labor practices. Pet. App. A20-A22 & n.7, A24 & nn.9, 10.

The Board found that petitioner violated Section 8(a)(1), (2) and (3) of the Act (29 U.S.C. 158(a)(1), (2) and (3)) by recognizing Local 80 and entering into the collective bargaining agreements containing union-security clauses.[5] These findings rested on two independent grounds. First, the Board relied on the fact that Local 115's valid election

[5] The Board also found that Local 80 violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. 158(b)(1)(A) and (2)) by accepting recognition and entering into contracts containing union-security clauses. These findings also were affirmed by the court of appeals, on the same grounds upon which the court affirmed the findings against petitioner (see pages 6-7, *infra*). Local 80, whose recognitional rights are at stake in this case, has not sought review in this Court.

unit sought by Local 115. On June 29, Local 80 demanded recognition as the exclusive bargaining representative of the Company's employees. Pursuant to a card check conducted by James L. Marchese, Assistant Regional Director of the American Arbitration Association, certifying Local 80's majority support, Haddon House recognized Local 80. (A. 20). At this time, the Company had not complied with the order in *Haddon House I;* three employees had not been offered reinstatement and the Company had not offered Local 115 any of the access remedies required by the Board. (A. 22).

On or about July 24, 1981, the Company and Local 80 executed a collective bargaining agreement covering the rates of pay, wages, hours of employment and other terms and conditions of employment of employees in separate bargaining units of production and warehouse employees. Article VI of the contract is a union security clause:

> All employees covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall maintain their membership in good standing, as a condition of employment, for the duration of this Agreement. All employees who are not members of the Union in good standing and all employees hired on or after the effective date of this Agreement shall, as a condition of employment, become members of the Union within 30 calendar days following the effective date of this Agreement or date of employment, whichever is the later, and thereafter shall maintain Union membership in good standing for the duration of this Agreement. For purpose of this Agreement the term "good standing" is defined to refer only and to be limited to the payment of Union membership dues and initiation fees.

The Company and Local 80 have "given effect to" this union security clause. (A. 21).

Local 115 was unaware of Local 80's organizing campaign and of the proceeding before the American Arbitration Association. The Company did not notify the Association that Local 115 had filed a representation petition which was being held in abeyance or

that it had not yet remedied all the unfair labor practices found by the Board and enforced by the Court of Appeals. (A. 20, 22).

When the Company recognized Local 80 and executed the collective bargaining agreement, it had not complied with several provisions of the Board order as enforced by the court in *Haddon House I*. Specifically, the Company had failed to offer reinstatement to three employees classified as unfair labor practice strikers and had failed to take most of the affirmative action required by the Order. (A. 22).

At the time Local 115 filed its representation petition with the Board and demanded recognition from the Company, it had an interest in representing the Company's employees. *Haddon House I, supra*., 242 NLRB at 1058, n. 7. Local 115's interest in representing the employees continued uninterrupted thereafter. (A. 22).

The Supreme Court denied both Local 115's and the Company's Petitions for a Writ of Certiorari on October 5, 1981.

On December 22, 1981, the Company urged the Board to reconsider the remedies granting Local 115 access to its premises, because the Company had already recognized Local 80 as the bargaining agent of its employees. Thus, the Employer argued, "the present composition of the Board's Order in several important instances has become either moot, irrelevant to the current factual setting or inapposite to the Board's remedial mandate of effectuating the policies and purposes of the Act." (A. 214-226). The Board denied the motion because the court order deprived it of jurisdiction to modify the order. *Haddon House Food Products, Inc.*, 260 NLRB 1080 (1982).

THE BOARD'S DECISION AND ORDER

On the record, the Board concluded that the Company violated Section 8(a)(1), (2) and (3) of the Act by extending recognition to and executing a contract containing a union security clause with Local 80 while Local 115's representation petition was pending, while Local 115 had a continuing interest in representing

the employees and while the Company's " 'outrageous and pervasive' " unfair labor practices remained unremedied. (A. 25-26). Because of the unremedied unfair labor practices, the Board concluded, "Local 80 cannot be deemed to have represented an uncoerced majority of [the] Employer's employees at the time of recognition." (A. 25).

To remedy these violations, the Board ordered the Company to withdraw and withhold recognition from Local 80, to cease effectuating any collective bargaining agreement between them, unless and until Local 80 is certified in a Board-conducted election. The Board ordered Local 80 to withdraw as bargaining representative of the affected employees until it is certified by the Board. At the same time, the Board ordered the Company and Local 80, jointly and severally, to refund to affected employees all union dues collected pursuant to the union security clause in their contract. To remedy the unremedied violations in *Haddon House I*, the Board ordered "that the access remedies order in *Haddon House I* be extended for an additional two-year period from the date the required notice ordered in this proceeding is posted." (A. 26-27).

The Third Circuit enforced the Board's Order, adopting both the *Bruckner Nursing Home* rationale and the finding that the employees were still suffering from coercion when the Company recognized Local 80.

ARGUMENT

THE PETITION RAISES NO ISSUE WORTHY OF RESOLUTION BY THE COURT

It is settled law that recognition of a union which lacks uncoerced majority support constitutes a violation of Section 8(a)(2) of the Act. *ILGWU v. NLRB*, 366 U.S. 731 (1961); *Paul O'Neill Int'l Detective Agency v. NLRB*, 280 F.2d 920, 930 n. 2, 930-940 (3d Cir. 1960); *NLRB v. Jon Power, Inc.*, 421 F.2d 1050, 1061-1062 (9th Cir. 1970). The Petition does not suggest a single court which has rejected the proposition that employees selecting

a union must do so voluntarily and without coercion by either a union or thir employer.

The Petion utterly fails to address the Board's finding (A. 25-26), enfrced by the Third Circuit (A. 13-14), that the employees were not free from the effects of the 1975 unfair labor practices *atthe time* the Company recognized Local 80. This failure in understandable for the parties have stipulated that the Company hd not yet offered to reinstate three unfair labor practice strikersand, perhaps more importantly, had not begun to comply wit the access provisions required by *Haddon House I.* (A. 28). In *Iaddon House I,* the Board concluded that the Company's "unfir labor practices are such that they are likely to have a continuing oercive effect on the free exercise by employees of their Sectio 7 rights long after the violations have occurred ..." Thus, the loard created a series of extraordinary remedies "to dissipate asmuch as possible the lingering atmosphere of fear created by [he Company's] unlawful conduct and to insure that if the questionof union representation is placed before employees in the future tey will be able to voice a free choice." 242 NLRB at 1058. Geard to the eventual scheduling of Local 115's pending representaton petition, these affirmative remedies required the Company t

> (3) upo request, grant the Union and its representatives reasonale access to its bulletin boards and all places where otices to employees are customarily posted; (4) upon quest, grant the Union reasonable access to its plant inonwork areas during employees' nonwork time; (5) supy the Union, upon request made within 1 year of the da of this Decision and Order, the names and addresseof its current employees; (6) give notice of, and equal ne and facilities for the Union to respond to, any addresmade by Respondent to its employees on the question ofnion representation; and (7) afford the Union the right to deliver a 30-minute speech to employees on worktime prior to any Board election which may be scheduled in which the Union is a participant. Provisions (3), (4)(6), and (7), above, shall apply for a period of 2

> years from the date of the posting of the notice provided by the Order herein or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

242 NLRB at 1058-1059 (footnotes omitted). Clearly the Board contemplated an election within the next two years, after its remedial order had dissipated the effect of the Company's egregious and pervasive unfair labor practices.

Indeed, the District of Columbia Circuit agreed that these remedies "would restore the employee confidence necessary to permit a free and untrammeled representation decision." The court affirmed the access remedies, concluding that they were "designed to assist [Local 115] in communicating with the employees in hearing [Local 115's] side of the story without fear of retaliation." *Haddon House I, supra*, 640 F.2d at 399-400.

When the Company recognized Local 80, Local 115 and the Company's employees had received no benefit from these access remedies. The Third Circuit reasonably concluded, "The Board's finding that the effects of the 1975 unfair labor practices made unfettered employee free choice unlikely while those practices remained unremedied is supported by substantial evidence in the record as a whole." (A. 13-14).

Because the Board's and the Third Circuit's opinions are based upon two independent rationales, the Company's failure to challenge the "coerced majority" rationale renders the attack on *Bruckner Nursing Home*, 262 NLRB 955 (1982), moot. Even if reliance upon *Bruckner* were misplaced, the Third Circuit's judgment would nonetheless remain valid.

CONCLUSION

For the reasons stated herein, the Petition should be denied.

Respectfully submitted,

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Dated: December 16, 1985

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Local 115's Opposition To Petition For Writ Of Certiorari have been mailed first-class, postage prepaid this 16th day of December, 1985 to the following:

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